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BY FACSIMILE

February 7, 1996

MEMORANDUM

I met this afternoon for about an hour with C. Lee Peeler at the Federal Trade Commission. Peeler is the Associate Director for Advertising Practices in the Bureau of Consumer Protection. Peeler was accompanied by Shira Modell and Michael Ostheimer, two staff attorneys. I requested the meeting, after being authorized to do so by each of the cigarette manufacturers, in the wake of reports in the news media and trade press that the Commission was preparing to propose changes in the system for testing and reporting "tar" and nicotine yields, and also was considering limitations on "implied" health claims.

Peeler stated that the Commission staff is preparing a document that he hopes to forward to the Commissioners by March 1. The document will address two major issues, as discussed below, and will make recommendations. The Commission then will publish a notice in the Federal Register, not proposing action but inviting public comment on what the Commission should do and how the Commission should do it. Peeler said that all of the Commissioners but Varney had expressed strong support for reexamining the current system.

When I called to request the meeting, Peeler told me that the staff had a draft report from the Ad Hoc Committee of the President's Cancer Panel, which had considered these issues at a conference in December 1994. Peeler invited me to file an FOIA request to obtain a copy of the draft report, explaining that funding problems stood in the way of completing the report. We submitted our FOIA request yesterday. At our meeting today, however, Peeler indicated that the draft report might not be releasable because it is a draft. He said that efforts are underway to complete the report.

T&N Ratings. Peeler said that the staff is concerned that smokers mistakenly believe the T&N ratings predict actual deliveries, whereas (the staff believes) the ratings understate actual deliveries. Peeler indicated that the staff will recommend that a

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- "range" of ratings be provided for each brand, with current ratings serving as the low end of the range and new ratings (produced by adjusting the parameters of the smoking machine) serving as the high end of the range.

I pointed out that such a range still would be only a range of smoking machine yields and thus would say nothing about actual deliveries. Peeler responded that a range at least would put smokers on notice that deliveries may vary, and he suggested that the ratings at the high end of the range in fact are likely to be truer approximations of actual deliveries than the ratings at the low end of the range. Peeler and Modell suggested that the current smoking machine parameters have been rendered obsolete by changes in smoking conditions, including changes in cigarette design.

Modell noted that the Commission had asked the manufacturers in its most recent special order for information about brands for which T&N ratings are not provided to consumers because the brand is not advertised and the ratings are not included on the package. (Dr. Freeman, the Chair of the Ad Hoc Committee, had suggested that 40 percent of the brands on the market failed to provide T&N ratings.) I asked Peeler why he thought the issue is significant. He answered that he thinks T&N information is important for consumers to have. I told him that from our own preliminary efforts to gather the information requested by the Commission in the special order, it appeared certain that less than 20 percent of the market on a sales-weighted basis, and possibly less than 10 percent of the market, consisted of brands for which T&N information is not provided either in advertising or on the package.

Descriptors. The staff also is concerned that smokers are misled by descriptors ("light," "ultra-light," "medium," "low-tar," "ultra-low-tar") into believing that a lower-yield cigarette actually delivers less T&N than a higher-yield cigarette, whereas (the staff believes) compensation makes the differences much less meaningful than smokers believe. According to Peeler, the issue presented by descriptors is even more important than any supposed misperceptions about the meaning of the ratings themselves. Nothing in our discussion suggested that the staff is focusing on other statements in cigarette advertising that antismoking advocates have attacked as "implied" health claims.

I suggested that many smokers understand these descriptors (leaving to the side those that refer expressly to "tar" or nicotine) as references to strength of taste or flavor, and only secondarily or incidentally may associate descriptors with T&N yields. Peeler allowed that this might be so in the case of descriptors connoting strong taste or flavor, but he clearly believes that smokers interpret such descriptors as "light" or "ultra-light" primarily as references to T&N deliveries. Peeler stated that the descriptors seem to be used by the manufacturers in a fairly standard fashion and asked if there is agreement upon their meaning. I responded that I do not believe there is any agreed upon definition of these terms, and I said that I normally look to the FTC reports when asked whether a brand with particular T&N ratings falls under one descriptor or another.

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Peeler indicated that compensation would be a major topic of discussion in the staff report. He and his associates affirmed that they are taking into account the submissions by the cigarette manufacturers to the Ad Hoc Committee of the President's Cancer Panel. I invited him to let us know if they need any of the material referred to in any of those submissions. They are particularly cognizant of the Gary Byrd study.

With respect to compensation, Peeler dismissed my observation that in many cases low-yield brands contain so much less tobacco than higher-yield brands that any compensation could not begin to erase the difference. His response was that smokers of higher-yield cigarettes may be smoking in a way that produces very low deliveries. Peeler also dismissed my suggestion that smokers do not need to have it explained to them that smoking a lot of low-yield cigarettes will result in greater T&N deliveries, just as people do not need to be told that eating a lot of low-fat cookies can make them fat. He responded that the analogy does not hold because we know how much fat is "delivered" in each cookie but not how much T&N is delivered by each cigarette.

Ultimately, Peeler did not indicate what the staff would recommend with respect to descriptors, and Modell subsequently confirmed to me that the staff is not yet clear on the direction it wishes to follow. However, Peeler did not leave me with the impression that the staff might recommend banning descriptors altogether.

Commission options. Peeler stated that the "whole range" of options is open for consideration, but he mentioned three in particular. First, he said that the Commission could ask the cigarette manufacturers to submit to new requirements under a new voluntary agreement. Second, he said that the Commission could issue "enforcement guidelines." Third, he said that the Commission could proceed by rulemaking. Peeler did not mention the possibility of proceeding by consent order.

FDA note. As the meeting concluded, I complained jokingly about having to prepare another set of agency comments. Peeler suggested that we make them short, and I promised they would be less than 2,000 pages. Modell then said that it wasn't the comments that are the problem but the appendices, and there was some mention of a room having to be devoted to storing them. I had the impression that the Commission has a set of our FDA comments and that the staff is reviewing them.

I am attaching a copy of an article from the January 1996 issue of the American Journal of Public Health by Joel Cohen, "Smokers' Knowledge and Understanding of Advertised Tar Numbers: Health Policy Implications." Cohen's prescriptions are more extreme than those that Peeler indicated the Commission staff is inclined to recommend.

David H. Remes

attachment

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cc: Mr. Blixt
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Ms. Oldham (Collier, Shannon)
Mr. Pepples
Mr. Schneider (Arnold & Porter)
Mr. Stevens
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